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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

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LESLIE LOWENFIELD,

*Petitioner,*

v.

C. PAUL PHELPS,
Secretary of the Department of Corrections
State of Louisiana, *et al.*,

*Respondents.*

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**On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

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## BRIEF FOR THE PETITIONER

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*Of Counsel:*
MAURICE ROSS
395 South End Avenue
New York, New York 10280

NANCY J. MARSHALL
755 Magazine Street
New Orleans, Louisiana 70130

STEVEN A. HIRSCH
KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER
425 Park Avenue
New York, New York 10022

DAVID KLINGSBERG
KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER
425 Park Avenue
New York, New York 10022

GARY S. GUZY *
1575 Eye Street, N.W.
Washington, D.C. 20005
(202) 483-8860
*Counsel for Petitioner*

* Counsel of Record

WILSON - EPES PRINTING CO., INC. 789-0096 - WASHINGTON, D.C. 20001

## THE QUESTIONS PRESENTED

(1) Did the sentencing hearing violate the petitioner's right to an individualized, reasoned and calm determination of whether a death sentence was appropriate and his right to due process and an impartial jury under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, where the circumstances demonstrated the threat of coercion and improper influence on the jury, and included the jury's avowed distress, disagreement and confusion after more than eight hours of deliberation; the trial court's questioning of the foreman and twice polling the jurors; three announced deadlocks; and a so-called "blasting" charge urging a unanimous verdict—all of which served no legitimate purpose since Louisiana provided for an automatic sentence of life without parole in the event of jury disagreement?

(2) Did Louisiana's capital sentencing statute, as applied to petitioner, violate the Eighth and Fourteenth Amendments to the United States Constitution where the death sentence was based on a single aggravating circumstance found in the sentencing phase hearing which did no more than duplicate an element of the underlying crime found at the guilt phase?

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## BRIEF FOR THE PETITIONER

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### OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit, reported at 817 F.2d 285 (5th Cir. 1987), is reprinted in the Joint Appendix at 100.

The unreported memorandum decision of the United States District Court for the Eastern District of Louisiana (Beer, D.J.) is reprinted in the Joint Appendix at 66.

### JURISDICTION

Invoking jurisdiction under 28 U.S.C. § 2254, the petitioner brought this *habeas corpus* petition in the Eastern District of Louisiana. On March 31, 1987, the Eastern District denied petitioner's request for relief and his application for a certificate of probable cause.

On May 11, 1987, the United States Court of Appeals for the Fifth Circuit denied petitioner's application for a certificate of probable cause to appeal and a stay of his execution.

The jurisdiction of this Court to review the judgment of the Fifth Circuit is invoked under 28 U.S.C. § 1254(1). The writ of certiorari was granted on June 22, 1987.

### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner relies on the Eighth Amendment to the Constitution of the United States:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Petitioner relies on the Sixth Amendment to the Constitution of the United States:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impar-

> tial jury . . . , and to have the Assistance of Counsel for his defense.

Petitioner also relies on Section 1 of the Fourteenth Amendment to the Constitution of the United States:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Petitioner further relies on Article 14:30 of the La. Rev. Stat. Ann. which defines first degree murder as:

> the killing of a human being . . . when the offender has a specific intent to kill or inflict great bodily harm on more than one person. . . .

Petitioner also relies on provisions of the Louisiana capital sentencing statute, La. Code Proc. Ann. art. 905 (West 1984 & Supp. 1986) which is reproduced in an appendix to this brief.

## STATEMENT OF THE CASE

On May 15, 1984, a jury in the 24th Judicial District, Jefferson Parish, Louisiana, found petitioner guilty of three counts of first degree murder. Petitioner was found to have murdered Sheila Thomas, a woman with whom he had lived and had recently broken up, and two members of her family. He also was convicted of manslaughter for the deaths of another male friend of Thomas' and her child by that friend. All the victims were found at the same time and at the same location. There were no eyewitnesses to the crime.

The jury deliberated for a total of thirteen hours before returning its verdict, including eight hours into the evening, on May 14th and for another five hours, into mid-

afternoon, on May 15th. (Joint Appendix submitted herewith, hereinafter referred to as "J.A.", 3-6).

After announcement of the guilt verdict, petitioner moved for a twenty-four to forty-eight hour hiatus so counsel could prepare for the penalty phase and the "jury [could] cool from the verdict."[1] (J.A. 28). The State objected and urged the court "to proceed within an hour." *Id.* At 3:05 p.m. on the same day—after the jurors had already been sitting for five hours on that day and deliberating a total of thirteen hours over the course of two days—the court denied petitioner's motion and noted his objection. *Id.* The court said that it had spoken to the jurors and "that they felt okay physically, mentally and that they didn't need time to rest." *Id.*

By 6:05 p.m., the court commenced the penalty phase. (J.A. 6). By 8:10 p.m., the penalty hearing had concluded, and the court delivered sentencing instructions. (J.A. 7, 43-46). Later that evening, after the jury had already spent ten hours in court, the jury began deliberating over whether to sentence petitioner to death. (J.A. 7).

Under Article 905.6 and 905.8 of the Louisiana Code of Criminal Procedure, the death penalty can be imposed only if the jury is unanimous in recommending death. Absent unanimity, the court must impose a maximum sentence of life imprisonment without parole.[2] Thus, the court instructed the jury:

---

[1] La. Code Crim. Proc. Ann. art. 905 (West 1984 & Supp. 1986) provides, "following a verdict of guilty in a capital case, a sentence of death may be imposed only after a sentencing hearng. . . ."

[2] La. Code Crim. Proc. Ann. art. 905.8 (West 1984 & Supp. 1986) provides, "[t]he court shall sentence the defendant in accordance with the recommendation of the jury. If the jury is unable to unanimously agree on a recommendation, the court shall impose a sentence of life imprisonment without benefit of probation, parole or suspension of sentence."

> The Court shall sentence the defendant in accordance with the recommendation of the jury. If the jury is unable to unanimously agree on a recommendation, the Court shall impose a sentence of life imprisonment without benefit of probation, parole, or suspension of sentence.

(J.A. 46).

The court delivered the first of two modified *Allen* charges: [3]

> When you enter the jury room it is your duty to consult with one another and to consider each other's views and to discuss the evidence with the objective of reaching a just verdict. If you can do so without violence to your individual judgment (sic). Each must decide the case for yourself but only after discussion and impartial consideration of the case with your fellow jurors. You are not advocates for one side or the other. Do not hesitate to re-exam[ine] your own views and to change your opinion if you are convinced you are wrong but do not surrender your honest belief as to the weight and effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

(J.A. 46).

At 11:30 that same evening, after the jury had sat for thirteen hours and fifty minutes that day, including five hours and twenty-five minutes on the penalty phase deliberations, the foreman sent the court two questions: (1) whether the jury's recommendation is binding on the judge, to which the judge gave an affirmative response; and (2) "if an unanimous decision on either verdict cannot be reached is the defendant automatically sentenced to life imprisonment?" (J.A. 47). The court responded by again explaining that unless the

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[3] The "*Allen*" charge owes its name to *Allen v. United States*, 164 U.S. 492 (1896). It refers to supplemental instructions urging the jury to forego their differences and come to a unanimous decision.

jury rendered a unanimous verdict, "[t]he defendant is automatically sentenced to life imprisonment without the benefit of pardon, parole, or suspension of sentence. The answer to the second one is yes." *Id.*

At 11:55 p.m. the jury foreman requested that the jury be allowed to retire for the night. Although the hour approached midnight and the jury had been in court for the past thirteen and a half hours, the court persisted in pressing the jurors as to whether "there [is] any way you could continue deliberating tonight and arrive at a verdict?" (J.A. 48). The foreman responded:

> I think what's happening, Your Honor, is the jury is tired. We've come up with one verdict. We haven't eaten since noon by our own choice and the group is getting quite tired. I just—we as a unit felt that we could better continue after resting.

(J.A. 48). The court told the jury that they would resume the next "morning at nine-thirty." *Id.* By that time, the jury had been in court on May 15 for close to fourteen hours.

At 9:40 a.m., on the following morning, the jury resumed its deliberations. (J.A. 8). Several hours later, petitioner made the first of three unsuccessful oral motions for a mistrial based on the coercive nature of the penalty phase. *Id.* He relied on the length of deliberations, which by then included more than five hours in the sentencing phase, following thirteen hours at the guilt phase. (J.A. 50). He also argued that the court's final instruction at the guilt phase had a residual effect at the sentencing phase. The court denied these motions. (J.A. 51).

Several hours later, petitioner made two more motions for a mistrial: one based on his own observation "that the jury is hopelessly hung," (J.A. 51-52), and a second based on a note from the jury informing the court that they were deadlocked. (J.A. 52). The note stated that

> [t]he jury is having great distress and is unable to reach a decision at this point. There is a great unbalance in the voting. Please call us back in and direct the jury again as to it's responsibilities and the oath it took. (signed) [The Foreman]

(J.A. 17).

The court denied the motion. (J.A. 53). At that point, the court called in the jury and in their presence inquired of the foreman whether the jury had reached "a verdict on any Count." *Id.* The foreman replied that it had not. *Id.*

Instead of finding the jury deadlocked under article 905.8, the court asked each individual juror to indicate on a signed slip of paper his or her answer to the following question: "if further deliberations would be helpful in obtaining a verdict". (J.A. 54). Four jurors indicated that "further deliberations would be of [no] . . . value." (J.A. 17, 54). This response, similarly, did not persuade the court to apply article 905.8 by imposing a life sentence.

Based on the responses, petitioner then remade his motion. (J.A. 54). The court denied the motion, as well as defense counsel's "special request that the Court specifically state to the jury that there is no obligation under the Law that they reach a verdict." (J.A. 55). The court, without comment, denied this request. *Id.*

A half hour after the first poll, the foreman again sent a note to the court indicating that some jurors were confused and requesting that the court poll the jurors again. (J.A. 9, 17). The court, having called the jurors into the courtroom, again polled the jury by asking each individual juror to put his or her name on a slip of paper and state whether the juror "feel[s] that any further deliberations will enable you to arrive at a verdict?" (J.A. 55). After the second poll, the tally was eleven

in favor of further deliberations and one opposed.[4] (J.A. 18, 56). The result of this second poll also failed to influence the court to trigger the application of article 905.8 even though the court advised the jury that if it was unable to agree unanimously on a recommendation the court was required to impose a life sentence. (J.A. 56).

Further emphasizing the court's refusal to accept a less than unanimous verdict, which would have required a life sentence, the court followed the second poll and admonition with a repetition of the modified *Allen* charge. The court instructed the jury that:

> [w]hen you enter the jury room it is your duty to consult with one another to consider each other's views and to discuss the evidence with the objective of reaching a just verdict if you can do so without violence to that individual judgment.
>
> Each of you must decide the case for yourself but only after discussion and impartial consideration of the case with your fellow jurors. You are not advocates for one side or the other. Do not hesitate to reexamine your own views and to change your opinion if you are convinced you are wrong but do not surrender your honest belief as to the weight and effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.
>
> Ladies and Gentlemen please retire to the jury room. (J.A. 56).

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[4] Specifically, the judge stated:

> I'm going to ask the question again. I'm going to change a couple of words of it to make it a little bit more precise. Then I'm going to pass out pieces of paper and I'm going to ask you again to write your name and answer to it.
>
> The question is: Do you feel that any further deliberations will enable you to arrive at a verdict?
>
> I'll repeat that: Do you feel that further deliberations will enable you to arrive at a verdict?
>
> Please put your name and yes or no.

(J.A. 55).

Approximately thirty minutes after the jury was polled for the second time, received the second *Allen* charge and was again reminded that only unanimity would result in a death sentence, the jury returned a verdict recommending death on all three counts. (J.A. 79). By the time it rendered its verdict, the jury had deliberated thirteen hours in the guilt phase and ten hours and eighteen minutes in the penalty phase for a total of over twenty-three hours of deliberations in two days.

The jury found, as to all three murder counts, the aggravating circumstance that petitioner had "knowingly created a risk of death or great bodily harm to more than one person," La. Code Crim. Proc. Ann. art. 905.4(d) (West 1984 & Supp. 1986), and thus sentenced him to death. Petitioner's conviction and sentence were upheld on direct review by the Louisiana Supreme Court. *State v. Lowenfield*, 495 So.2d 1245 (La. 1985), *cert. denied*, 106 S. Ct. 2259 (1986).

## SUMMARY OF ARGUMENT

Two fundamental aspects of the sentencer's determination that petitioner should die, each of which provides an independent ground for vacating the sentence, render it so arbitrary and unreliable that it is outside the bounds tolerated by the Eighth Amendment and Due Process. First, the jury was subjected to coercive practices which interfered with its ability to make the requisite individualized judgment of the appropriate punishment, and which impermissibly tipped the scales toward death. Second, due to the complete identity between the crucial element of petitioner's capital crime and the single statutory "aggravating" circumstance found by the jury, the sentencer was not required to make a focused and constitutionally guided sentencing determination that could distinguish the petitioner as uniquely deserving to die.

In order to impose a death sentence, Louisiana's bifurcated capital sentencing scheme requires the jury to

reach a unanimous verdict that a capital defendant who has been found guilty of first degree murder is to die. Under the statute, the jury's failure to reach a unanimous verdict automatically results in a sentence of life without parole. The trial court refused to abide by this statute and impose a life sentence, despite the jury's indication—after more than eight hours of unsuccessful deliberation—that it was "having great distress" and that there was "great unbalance in the voting." The trial court asked the foreman, and then twice required each individual juror to indicate by signing a slip of paper, whether he or she believed further deliberations could lead to a unanimous verdict. This process whittled down those who favored cessation of deliberations, which would have resulted in a life sentence, from four to one.

In forcing further deliberations on the jury towards a unanimous verdict, the court in effect communicated its desire for death, since under the Louisiana statute a non-unanimous decision automatically results in a life sentence. And if that were not enough to tip the scales toward death, the trial court delivered a so-called "blasting charge" urging the jurors not to hesitate to reexamine their opinions in order to reach a "just verdict." Any individualized deliberative judgment which the previously deadlocked jury was trying to reach was impermissibly threatened by this onslaught.

While the "risk" that the death sentence will be arbitrarily imposed is sufficient for reversal, the coercive effect here was confirmed by the jury's swift return of a unanimous verdict recommending death shortly after the blasting charge. Under all the circumstances, the trial judge overstepped the bounds of due process and encroached on the jury's authority and foreclosed a possible nonunanimous outcome. *United States v. United States Gypsum Company*, 438 U.S. 422, 432-33 (1978). *See also Jenkins v. United States*, 380 U.S. 445 (1965).

The Sixth and Eighth Amendments and Due Process require the careful protection of jury sentencing delib-

erations designed to assess the appropriate punishment for each capital offender. The isolation and breakdown of the resistance to death offered by conscientious holdout jurors cannot be tolerated in such a system. This Court has held that jury polling to identify such jurors is grounds for reversal because it serves no useful purpose, has a tendency to be coercive and is an improper influence on the jury. *Brasfield v. United States*, 272 U.S. 448 (1926). When combined with a "blasting charge" urging these jurors to reconsider their views—which a number of courts have held to be reversible error in the non-capital context—the practices are surely unacceptable in light of the need for increased reliability due to the qualitative difference of death from all other punishments. Significantly, the justification for these practices, *i.e.*, the need to avoid unnecessary and costly retrials, evaporates in view of Louisiana's determination that non-unanimity is as acceptable a sentencing verdict as is complete agreement, and no rehearing occurs in either event. *See Gardner v. Florida*, 430 U.S. 349, 365 (1977).

The second ground advanced for vacating the sentence is that the sole aggravating circumstance found by the jury at the sentencing phase was completely identical to a crucial element of the capital crime of which he was convicted. The Louisiana statute permits a jury to impose a sentence of death on a finding of a single statutory aggravating circumstance. Because of the complete overlap, the single "aggravating" circumstance failed to "genuinely narrow" the class of death-eligible persons, and thus failed to provide a rational basis for the sentencer to distinguish petitioner as particularly deserving to die in comparison to others who have committed the same offense. *Zant v. Stephens*, 462 U.S. 862 (1983); *Godfrey v. Georgia*, 446 U.S. 420 (1980). Through the duplication applied to petitioner, the Louisiana capital sentencing scheme did not enforce the primary means this Court has identified for constitutionally limiting and guiding sentencing discretion.

Once having concurred in the identical finding it made at the guilt stage, petitioner's sentencing jury was free to sentence him on the basis of whatever factors it chose. That Louisiana has narrowed its definitions of capital murder does not alleviate the constitutional shortcomings inherent in this unguided scheme. The jury's guilt phase determination was totally devoid of any sentencing considerations. This guilt phase determination was injected into the sentencing phase—without any instruction as to its weight—as the sole check on jury discretion. The uninstructed jury was free merely to echo its guilt phase finding without engaging in a constitutionally mandated individualized deliberative judgment of the appropriateness of sentencing petitioner to death. *Caldwell v. Mississippi*, 472 U.S. 320 (1985). Petitioner's sentence was rendered by a jury that—due to the structure and application of the Louisiana capital sentencing statute—never was required to come to terms with the awesome responsibility of its task, as the Eighth Amendment and Due Process mandate.

## ARGUMENT

### I. The Sentencing Hearing Was Unfair and Coerced a Death Verdict in Violation of Due Process and the Eighth Amendment.

The separate sentencing hearing held in this case violated standards of due process in that under all the circumstances, the jury was subjected to coercive practices which intruded on its fair decision of the issues under deliberation. As we will show, the practices imposed on the jury here have in various combinations, or in some cases individually, been held by this Court as well as other federal courts and state courts to warrant reversal of criminal convictions. Here the barrage of coercive acts creates an overwhelming case of departure from even minimal standards of due process, not to speak of the higher standards imposed in a death case.

The rendering of a death sentence by a coerced jury also violates fundamental Eighth Amendment principles.

Only last term, this Court reaffirmed that a death sentence may not be imposed simply because a defendant is guilty of an offense that has been defined as capital. *Sumner v. Shuman*, 55 U.S.L.W. 4931 (U.S. June 22, 1987). This Court has established as a constitutional requirement that a death sentence may only be imposed by a decision maker who has engaged in a highly individualized assessment designed to assure the appropriate punishment. *See, e.g., Skipper v. South Carolina*, 106 S. Ct. 1669, 1675 (1986) (Powell, J., Burger, C.J., and Rehnquist, J., concurring), *citing Woodson v. North Carolina*, 428 U.S. 280, 304 (1976); *Eddings v. Oklahoma*, 455 U.S. 104 (1982). Even before the application of the Sixth Amendment protections to the States via the Fourteenth Amendment, *see Duncan v. Louisiana*, 391 U.S. 145, 148-58 (1968), the Court required that where States accorded criminal defendants the right to trial by jury, the jury trial had to be conducted with fairness and impartiality. *See, e.g., Irvin v. Dowd*, 366 U.S. 717 (1961); *Parker v. Gladden*, 385 U.S. 363 (1966) (*per curiam*); *Turner v. Louisiana*, 379 U.S. 466 (1965). Thus, the issue raised here "goes to the nature of the jury trial which the Fourteenth Amendment commands when trial by jury is what the State has purported to accord." 379 U.S. at 471.

Louisiana has entrusted to a jury the "awesome responsibility"[5] of determining who shall live ~~and~~ who shall die. La. Code Crim. Proc. Ann. art. 905 (West 1984 & Supp. 1986). Moreover, Louisiana has also determined not to permit imposition of the death penalty without a unanimous jury decision. *Id.* This Court has taken great pains to ensure that where a State has entrusted this grave task to a jury, "the decision whether a man deserves to live or die must not be made on scales that are deliberately tipped toward death." *Witherspoon v. Illinois*, 391 U.S. 510, 521 n.20 (1968). Rather, each

[5] *McGautha v. California*, 402 U.S. 183, 208 (1971).

juror's ability to make the "unique individualized judgment regarding the punishment that a particular person deserves," *Caldwell v. Mississippi*, 472 U.S. 320, 340 n.7 (1985) and to do so with reason and calm rather than emotion and caprice, must be carefully guarded. *See also, California v. Brown*, 107 S. Ct. 837, 840 (1987).

Another important determination made by Louisiana is that where the jury is not in unanimous agreement as to the sentence, there is automatically imposed a sentence of life imprisonment without probation, parole, or suspension of sentence. La. Code Crim. Proc. Ann. art. 905.8 (West 1986). Thus, unlike the ordinary criminal trial where the jury's failure to reach a verdict can result in the necessity of a new trial and expenditure of judicial resources, here there is no societal benefit which justifies the use of any practices which tend to coerce juries into reaching unanimity. Here by statute, the vote of even one juror against the death penalty should have produced a result that was as final and definitive as a unanimous verdict for a life sentence. Accordingly, each effort to persuade and cajole the jury to return a unanimous verdict was in effect a message to vote for a death sentence. These particular circumstances magnified the effect of the coercive conduct here, which was highly questionable in any context. Under all of the circumstances this hearing failed to meet the standards for fairness and impartiality required under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

### A. Under All the Circumstances, the Conduct of the Sentencing Hearing Was Coercive and Unfair.

While a number of the individual practices applied to the jury in this case have been the subject of criticism and held to be grounds for reversal, it is the combination of circumstances, which is unprecedented, that created a shocking atmosphere for coercion and diversion of the jury from their reasoned consideration of the factors

relevant to its life or death determination. In analogous situations, this Court has looked to "all the circumstances" to determine whether the standards of fairness and impartiality have been met. *Jenkins v. United States*, 380 U.S. 445, 446 (1965) (holding "coercive" under all the circumstances trial judge's telling jurors who reported a disagreement that "[y]ou have got to reach a decision in this case"). A framework for such analysis is suggested by Chief Justice Burger's opinion in *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978), where the court concluded from all the circumstances that the trial judge had "encroach[ed] on [the] jury['s] authority" and "foreclosed a 'possible "no verdict" ' " outcome, 438 U.S. at 459, *quoting opinion below*, 550 F.2d 115, 134 (3d Cir. 1977).

The Court in *Gypsum* first considered the "background of internal pressures and apparent disagreements and confusion among the jurors." 438 U.S. at 460. Each of these descriptive terms is applicable here where after more than eight hours of deliberation the jury reported itself to be "in great distress," "unable to reach a decision," in "great unbalance," and in need of direction as to its responsibilities. (J.A. 17). The jurors here also reported, after being polled, that they were confused as to the judge's question. *Id.*

In *Gypsum*, this Court next focused on the trial judge's communication with the foreman, which in that case was *ex parte*. The important analogous circumstance is that the judge gave the impression that he "wanted a verdict." 438 U.S. at 460. Since the jury here had been told that the lack of unanimity would result in an automatic life sentence, the trial judge's questioning of the foreman regarding further deliberations was a first step in a course of conduct which conveyed a clear message to the jurors that he wanted a unanimous verdict.

Following the interchange with the foreman in the hearing here, (J.A. 54), the trial judge undertook to poll the jury, a practice condemned as improper and

coercive by this Court in *Brasfield v. United States*, 272 U.S. 448 (1926). In that case, the judge had asked the foreman how the jury was divided numerically, and was told that it stood nine to three, but not which side favored conviction. In reversing the conviction, Justice Stone, writing for the Court, depicted the vice of this practice:

> We deem it essential to the fair and impartial conduct of the trial, that the inquiry itself should be regarded as ground for reversal. Such procedure serves no useful purpose that cannot be attained by questions not requiring the jury to reveal the nature or extent of its division. Its effect upon a divided jury will often depend upon circumstances which cannot properly be known to the trial judge or to the appellate courts and may vary widely in different situations, but in general its tendency is coercive. It can rarely be resorted to without bringing to bear in some degree, serious although not measurable, an improper influence upon the jury, from whose deliberations every consideration other than that of the evidence and the law as expounded in a proper charge, should be excluded. Such a practice, which is never useful and is generally harmful, is not to be sanctioned.

272 U.S. at 450.

Here, there were two pollings (J.A. 54-55) which in effect required the jury "to reveal the nature or extent of its division," and therefore had the same "tendency [to be] coercive" and to exert the "improper influence" on the jury that *Brasfield* condemns. Since the jurors knew that the Louisiana statute provided for a deadlock in the event of a jury disagreement, they also must have realized that opposing further deliberations was tantamount to communicating to the Court that they favored life imprisonment which would result automatically from cessation of the proceedings. Thus, it is reasonable to conclude that the four jurors isolated by the first poll as being opposed to further deliberations were also re-

vealing their opposition to recommending the death penalty.

The improper influence and coercion found in *Brasfield* were exacerbated here by the second polling. By slightly rephrasing the question, the trial judge in effect communicated his view that he was not pleased with the four holdouts and that he favored a unanimous verdict and the death penalty. The consequence of this action was to whittle down from four to one the minority who apparently favored terminating deliberations, which would have automatically resulted in a life sentence. Again the judge had an opportunity to proceed in accordance with the Louisiana Criminal Code by declaring that the jury's disagreement required imposition of a life sentence. But the court again refused to accept the deadlock and instead delivered, for the second time, a modified version of the *Allen* charge which urged the jurors to return a unanimous and "just" verdict. (J.A. 56). At this point, the pressure that the court's action put on the lone holdout must have been enormous.

In *Gypsum*, as here, the repetition of a modified *Allen* charge was a factor considered by this Court in concluding that the circumstances were akin to *Jenkins* where the court impermissibly communicated to the jury its view that it had to reach a verdict. 438 U.S. at 462. Since the approval of the *Allen* charge by this Court almost a century ago, *Allen v. United States*, 164 U.S. 492 (1896), the practice has been subject to severe criticism as being coercive and intruding on the independent function of the jury.[6] For this reason three

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[6] *See United States v. Rey*, 811 F.2d 1453, 1459 (11th Cir. 1987) (regardless of the specific wording of the charge, "[p]ractically, the pressure to change position will fall most heavily on the minority" (emphasis omitted)); *Huffman v. United States*, 297 F.2d 754, 759 (5th Cir. 1962) (Brown, J., dissenting) (*Allen* charge is "an interference with [the] rightful independence" of the jury); *United States v. Fioravanti*, 412 F.2d 407, 417 (3d Cir.), *cert. denied*, 396 U.S. 837 (1969) (*Allen* charge "departs from the sole legitimate purpose of a jury to bring back a verdict based on the

federal circuits[7] and a number of states[8] banned the charge in the form used in *Allen*. In reaction to the criticism, an American Bar Association committee crafted a modified version of the *Allen* charge with language changes designed to balance the admonition to reach agreement and to ameliorate the direct pressure on the minority to conform to the majority's views.[9] Nevertheless, the practice is still regarded as having coercive and undesirable effects which are tolerated only because of the countervailing policy of avoiding retrials of criminal cases and the desirable goal of achieving finality in judicial proceedings.[10] In this death sentence proceeding,

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law and the evidence received in open court"); P. Marcus, *The Allen Instruction in Criminal Cases: Is the Dynamite Charge About to Be Permanently Defused?* 43 Mo. L. Rev. 613, 624-37 (1978); Note, *Due Process, Judicial Economy and the Hung Jury: A Reexamination of the Allen Charge*, 53 Va. L. Rev. 123, 136-149 (1967).

[7] *See United States v. Thomas*, 449 F.2d 1177 (D.C. Cir. 1971) (*en banc*); *United States v. Fioravanti*, 412 F.2d 407 (3d Cir.), *cert. denied*, 396 U.S. 837 (1969); *United States v. Brown*, 411 F.2d 930 (7th Cir. 1969), *cert. denied*, 396 U.S. 1017 (1970).

[8] *See Fields v. State*, 487 P.2d 831 (Alaska 1971); *State v. Thomas*, 86 Ariz. 161, 342 P.2d 197 (1959); *People v. Gainer*, 19 Cal. 3d 835, 566 P.2d 977, 139 Cal. Rptr. 861 (1977); *Taylor v. People*, 176 Colo. 316, 490 P.2d 292 (1971); *People v. Prim*, 53 Ill. 2d 62, 289 N.E.2d 601 (1972), *cert. denied*, 412 U.S. 918 (1973); *State v. Nicholson*, 315 So. 2d 639 (La. 1975); *People v. White*, 285 A.2d 832 (Maine 1972); *People v. Sullivan*, 392 Mich. 324, 220 N.W.2d 441 (1974); *State v. Randall*, 137 Mont. 534, 353 P.2d 1054 (1960); *State v. Garza*, 185 Neb. 445, 176 N.W.2d 664, 666 (1970); *Azbill v. State*, 88 Nev. 240, 495 P.2d 1064 (1972); *State v. Czachor*, 82 N.J. 392, 413 A.2d 593 (1980); *State v. Alston*, 294 N.C. 577, 243 S.E.2d 354 (1978); *Commonwealth v. Spencer*, 442 Pa. 328, 275 A.2d 299 (1971); *State v. Ferguson*, 84 S.D. 605, 175 N.W.2d 57 (1970); *Kersey v. State*, 525 S.W.2d 139 (Tenn. 1975); *Kelley v. State*, 51 Wis. 2d 641, 187 N.W.2d 810 (1971).

[9] *See* American Bar Association Project on Minimum Standards for Criminal Justice, *Trial by Jury* 133-34 (approved draft 1968).

[10] *See, e.g., State v. Alston*, 294 N.C. 577, 243 S.E.2d 354, 365 (1978); Note, *Due Process, Judicial Economy and the Hung Jury: A Reexamination of the Allen Charge*, 53 Va. L. Rev. 123, 123-27 (1967).

however, there is no such counterbalancing rationale for intruding on the jury's function in view of the Louisiana statute which provides for an automatic sentence of life without parole if the jury is not unanimous. Since a non-unanimous jury here would not have required any retrial of the sentencing issues, the direction to the jury to attempt to reach a unanimous verdict stands nakedly coercive without any justification other than to "tip the scales towards death." [11]

Based on this reasoning, the highest courts of three states have reversed death sentences where—as here—the trial judge urged a verdict upon a jury whose failure to agree would have resulted in an automatic life sentence under state law. *Rush v. State*, 491 A.2d 439 (Del. 1985) (where "lack of unanimity *per se* results in a sentence of life imprisonment, such [a verdict-urging] instruction is fatal as being overly coercive"); *Patten v. State*, 467 So. 2d 975 (Fla.), *cert. denied*, 106 S. Ct. 198 (1985); *State v. Ramseur*, 106 N.J. 123, 524 A.2d 188, 285 (1987).

Moreover, the verdict-urging charge has been recognized as particularly coercive where it is used not merely in the main instructions but as a " 'dynamite charge' to blast a deadlocked jury into a verdict." *United States v. Fioravanti*, 412 F.2d 407, 419 (3d Cir.), *cert. denied*, 396 U.S. 837 (1969).[12] In contrast to the situation at

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[11] There is scientific support for the view that there is pressure on minority jurors to conform their views to those of the majority. S. Asch, *Studies of Independence and Conformity: A Minority of One Against a Unanimous Majority*, 70 Psychological Monographs: General and Applied 1 (1956). Such pressures are magnified by a "blasting charge" since "[a] minority member might well take the charge as an invitation to allow the majority to rule." Note, *Deadlocked Juries and Dynamite: A Critical Look at the "Allen Charge"*, 31 U. Chi. L. Rev. 386, 389 (1964).

[12] Jury instructions designed to move deadlocked jurors toward a verdict have been variously referred to by courts as "blasting" charges, "dynamite" charges, "third degree" instructions and "shotgun" instructions. *United States v. Fioravanti*, 412 F.2d 407, 419 & n.29 (3d Cir. 1969), *cert. denied*, 396 U.S. 837 (1969).

the time of the initial instructions where there is no identifiable minority subject to pressure, after the announcement of a deadlock—particularly where, as here, the judge knows what the vote is and the jurors have signed notes indicating their minority or majority position—the charge takes on a more ominous meaning to the holdouts. *Potter v. United States*, 691 F.2d 1275, 1276 n.1 (8th Cir. 1982). For this reason, the Tenth Circuit has ruled that "[i]f the *Allen* instruction is given at all, it should be incorporated into the body of the Court's original instructions to the jury. It should not be given during the course of deliberations." *United States v. Blandin*, 784 F.2d 1048, 1050 (10th Cir. 1986) (citation omitted); *see also Fioravanti*, 412 F.2d at 419.

The variation of the *Allen* charge given here also interfered with the burden of proving aggravating circumstances beyond a reasonable doubt which Louisiana imposes on the State in death sentence hearings.[13] The jury charge approved by this court in *Allen* contained a reminder of the government's burden of proof. Based on this historical precedent and because absent such a proviso, "the charge might move some jurors to forget the prosecution's heavy burden of proof," *United States v. Angiulo*, 485 F.2d 37, 39 (1st Cir. 1973), the First and the Eighth Circuits have required inclusion of the burden of proof reminder, which was in the form of charge this Court approved in *Allen*. *Potter v. United States*, 691 F.2d 1275, 1278 (8th Cir. 1982); *Pugliano v. United States*, 348 F.2d 902, 903-04 (1st Cir.), *cert. denied*, 382 U.S. 939 (1965). Accordingly, the blasting charge

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[13] The jury in a Louisiana capital sentencing proceeding must find defendant guilty of at least one aggravating circumstance "beyond a reasonable doubt." *State v. Loyd*, 489 So. 2d 898, 901 (La. 1986), *cert. denied*, 107 S.Ct. 1984 (1987). Even beyond this, petitioner's counsel properly urged the jury to consider any lingering doubts as to petitioner's guilt, especially given the length of the jury's deliberations in the guilt phase. *See generally Lockhart v. McCree*, 106 S. Ct. 1758, 1768-69 (1986) (adverting to "residual doubts" as "effective" mitigating argument).

given here subordinated the State's burden of proof beyond a reasonable doubt to a non-existent need for a unanimous verdict.

The most pernicious aspect of the *Allen*-type charge given here, which under similar circumstances has led many federal and state courts to find it unacceptably coercive, is its juxtaposition with the polling of the jury and isolation of the minority jurors as its target. In that context, the admonition to reach agreement is boldly directed at the minority jurors. As a result, all of the coercive effects, which the modern language modifications sought to ameliorate, come to the fore. The Ninth Circuit's description of strikingly similar circumstances, which led it to reverse a conviction, is apt:

> Under these circumstances the charge could only be read by the dissenting juror as being leveled at him. He could hardly escape reasoning that . . . he, individually, was being urged by the judge to reconsider his vote.

*United States v. Sae-Chua*, 725 F.2d 530, 532 (9th Cir. 1984) (citations omitted). *Accord*, *Cornell v. Iowa*, 628 F.2d 1044, 1048 n.2 (8th Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981) ("the impression is inherently conveyed to the jury that the revelation of their division prompted the giving of the subsequent verdict-urging instruction and that it is, therefore, directed toward the minority jurors"); *Williams v. United States*, 338 F.2d 530, 531 (D.C. Cir. 1964) (reversal where *Allen* charge followed query to jury foreman as to whether there was an even division); *Nigro v. United States*, 4 F.2d 781, 785 (8th Cir. 1925) (same); *People v. Santiago*, 108 Ill. App. 3d 787, 439 N.E.2d 984 (Ill. App. Ct. 1982); *People v. Carter*, 68 Cal. 2d 810, 816, 442 P.2d 353, 357, 69 Cal. Rptr. 297, 301 (1968); *State v. Ferguson*, 175 N.W.2d 57 (S.D. 1970).[14]

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[14] In determining whether the presence or absence of particular procedures—such as the blasting charge and jury polling—offends

The widespread condemnation of delivering an *Allen*-type charge after a jury poll indicating the existence of a split and worse still, as here, after identification of the minority, weighs as a strong factor in assessing whether the totality of the circumstances here violated the standards of due process. The lone dissenter, after hearing the foreman questioned in open court, and after two pollings in which he had to reveal his identity by signing a paper indicating his position, could not have helped but feel that the final verdict-urging charge was directed towards pressuring him personally to relinquish his view.

The final factor in the analysis of the likely coercive effect of the conduct of the sentencing hearing is the relative brevity of the time in which the hold-out juror relented after the blasting charge and other actions of the court. Here, the jury reported its "great distress" and "great unbalance" in the second day of deliberations on the sentencing phase after a total of five hours. (J.A. 8). Then, during the course of the next hour or so, the jury reiterated its deadlock no less than three times. (J.A. 53-56). Yet, half an hour after the blasting charge, the jury suddenly returned a unanimous verdict for the death sentence. The importance of this circumstance was also reflected in this Court's opinion in *Gypsum*, where the jury returned a verdict the morning after the repetition of the modified *Allen* charge and

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the Due Process Clause, this court has traditionally relied on the views expressed by the state courts and lower federal courts to determine whether the Constitution's fundamental fairness standard has been met. *See, e.g., Sandstrom v. Montana*, 442 U.S. 510, 514 & n.3 (1979) (federal and state court holdings cited as evidence of unconstitutionality of jury instruction that defendant is presumed to intend ordinary consequences of his voluntary acts); *Beck v. Alabama*, 447 U.S. 625, 637 (1980) ("While we have never held that a defendant is entitled to a lesser included offense instruction as a matter of due process, the nearly universal acceptance of the rule in both state and federal courts establishes the value to the defendant of this procedural safeguard").

communication with the foreman. As Chief Justice Burger explained:

> this swift resolution of the issues in the face of positive prior indications of hopeless deadlock, at the very least, gives rise to serious questions in this regard.

438 U.S. at 462. *Accord*: *Jones v. Norvell*, 472 F.2d 1185 (6th Cir.), *cert. denied*, 411 U.S. 986 (1973) (*Brasfield* polling, *Allen* charge and "the speedy return of a verdict subsequent to the charge" held ground for reversal of state court conviction on *habeas* petition); *United States v. Bass*, 490 F.2d 846 (5th Cir. 1974), *overruled in part on other grounds*, *United States v. Lyons*, 731 F.2d 243, 246 (5th Cir.) (*en banc*), *cert. denied*, 469 U.S. 930 (1984) (reversing conviction where jury returned verdict in less than an hour after ordered to continue deliberations); *United States v. Smith*, 353 F.2d 166 (4th Cir. 1965) (reversing conviction where jury returned verdict 40 minutes after *Allen* charge); *United States v. Fossler*, 597 F.2d 478 (5th Cir. 1979) (one hour after second *Allen* charge); *Taylor v. State*, 17 Md. App. 41, 299 A.2d 841 (Md. Ct. Spec. App. 1973) (verdict twenty minutes after polling and remark suggesting that holdout should give in); *State v. Aragon*, 89 N.M. 91, 547 P.2d 574 (N.M. Ct. App.), *cert. denied*, 89 N.M. 206, 549 P.2d 284 (1976) (verdict twenty minutes after two polls and *Allen* charge given after three-and-a-half hours of deliberation); *United States v. Scott*, 547 F.2d 334, 337 (6th Cir. 1977) ("prejudicial impact" of *Allen* charge "dramatically illustrated when the jury, which had spent eight and one-half hours of fruitless deliberations, achieved unanimity in only fourteen minutes after its delivery").[15]

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[15] In contrast to the above circumstances which make quite clear the court's message, in most cases where this Court and others have reversed convictions the coercive intent and effect was not so readily apparent and a mere tendency to coerce or intrude on the jury was held sufficiently improper. Thus, in *Gypsum*, 438 U.S. 422,

Moreover, in light of the Louisiana statutory provision requiring a life sentence if the jury is nonunanimous, about which the jury was repeatedly instructed, the trial court's refusal to accept the jury's three expressions of disagreement and its instruction to try to reach a unanimous and "just" verdict, was in effect a message that the Court was urging the death sentence. *See Rush v. State*, 491 A.2d at 453-54. If the trial court was properly neutral, it would have made it clear to the jury that a disagreement, which would have resulted in a sentence of life without parole, was equally as "just" and acceptable as a unanimous verdict, which was statutorily required for death. Surely, the dissenting jurors, who were required to sign their names to indicate that they did not favor further deliberations, understood in the face of the statutory results of their position that they were announcing

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Chief Justice Burger recognized that "it is, of course, impossible to gauge what part the disputed meeting played in the jury's action of returning a verdict the following morning," but nevertheless set aside the conviction "solely because of the risk that the foreman believed the Court was insisting on a dispositive verdict; a belief which we must assume was promptly conveyed to the jurors." 438 U.S. at 462. Here there is no question that the court directly conveyed to the jurors by its actions and words its desire for a death verdict, even though a "dispositive" result could have been achieved by accepting the jury's repeated expressions of disagreement. *See also Parker v. Gladden*, 385 U.S. 363, 365 (1966) (*per curiam*) (reversing a State murder conviction for violation of the Sixth Amendment, as incorporated in the Fourteenth, based on unauthorized remarks by a bailiff to the jury, where the conduct "involves such a probability that prejudice will result that it is deemed inherently lacking in due process"); *Brasfield*, 272 U.S. at 450 (setting aside the conviction based on jury polling if "in general its tendency is coercive" and "is generally harmful").

This Court's capital punishment decisions have also been sensitive to the risks of unreliability inherent in certain practices rather than insisting on proof of actual coercive effects. Thus, the Court has stated that a procedure must not "create the risk that a death sentence will be based on considerations that are 'constitutionally impermissible or totally irrelevant to the sentencing process.'" *Booth v. Maryland*, 55 U.S.L.W. 4836, 4837 (U.S. June 15, 1987), *quoting Zant v. Stephens*, 462 U.S. 862, 885 (1983).

in favor of life. And the court's refusal to invoke that statutory result, the subsequent pollings and the verdict-urging instruction signaled its intention that the jury deliberate further, which could only have been interpreted as for the purpose of achieving a unanimous verdict of death.

Under all of the circumstances, the conduct of the sentencing hearing had a "coercive effect." *Jenkins v. United States*, 380 U.S. 445, 446 (1965). As this Court concluded in *Gypsum*, "the logic of *Jenkins* cannot be said to be inapposite here, given the peculiar circumstances." 438 U.S. at 462. What occurred here is equivalent to "directing the jury that it *had* to reach a verdict." *Id.*

Under similar circumstances federal courts have consistently held that due process has been violated requiring reversal of state court conviction, *Jones v. Norvell*, 472 F.2d 1185 (6th Cir. 1973), and that the coercive effect warranted reversal of federal convictions, *e.g.*, *United States v. United States Gypsum Company*, 438 U.S. 422 (1978); *Brasfield v. United States*, 272 U.S. 448 (1926); *United States v. Fossler*, 597 F.2d 478 (5th Cir. 1979); *United States v. Seawell*, 550 F.2d 1159 (9th Cir. 1977). These cases are compelling support for holding that the conduct of the sentencing hearing intruded on the jury's individualized decision making process and coerced the minority jurors into a unanimous death verdict in contravention of the Due Process Clause and the Eighth Amendment.

### B. Judicial Coercion of the Sentencing Jury Deprived Petitioner of Due Process.

Where, as in Louisiana, the legislature has accorded capital sentencing responsibility to the jury, this Court's precedents require that the sentencing phase jury be permitted to deliberate in a fair and impartial manner. Even before this Court's holding in *Duncan v. Louisiana*, 391 U.S. 145 (1968), that the Sixth Amendment right to

jury trial applies to the States, the Court insisted on so much. The Court in such cases addressed the issue posed here of "the nature of the jury trial which the Fourteenth Amendment commands when trial by jury is what the State has purported to accord." *Turner v. Louisiana*, 379 U.S. 466 (1965). In articulating "the constitutional concept of trial by jury," the Court specified that "[e]xercise of calm and informed judgment by its members is essential to proper enforcement of law." 379 U.S. at 472. The Court quoted Mr. Justice Holmes' observation that "[a]ny judge who has sat with juries knows that . . . they are extremely likely to be impregnated by the environing atmosphere." *Id.* Here the environing atmosphere during the final hours of jury confusion, disagreement, polling and the urging of a unanimous verdict was bent in favor of the death penalty and intruded on the jury's exercise of independent judgment.

The right to an impartial jury free of improper influence was also the premise for finding a violation of due process that required overturning a State death sentence conviction in *Irvin v. Dowd*, 366 U.S. 717 (1961), in which the Court held:

> [T]he right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, "indifferent" jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process. . . . In the language of Lord Coke, a juror must be as "indifferent as he stands unsworn. . . . His verdict must be based upon the evidence developed at the trial."

366 U.S. 722 (citations omitted). *See also Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Estes v. Texas*, 381 U.S. 532, 545 (1965); Note, *Due Process, Judicial Economy and the Hung Jury: A Reexamination of the Allen Charge*, 53 Va. L. Rev. 123, 138 (1967) ("[W]here the jury is the chosen instrument of decision, the Supreme Court has insisted upon strict standards designed to preserve the jury's impartiality"). Since where the

State accords the right to jury trial, the proceedings must be fair and impartial, it follows that practices which are condemned as coercive and intruding on the jury's determination from the evidence alone, must—at least in a capital case—be considered to violate fundamental due process standards. *See Skipper v. South Carolina*, 106 S. Ct. 1669, 1674 (Powell, J., Burger, C.J., and Rehnquist, J., concurring); *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

In determining the point at which the requirement of due process of law will be isolated, it is elemental that the interests of society in requiring or denying certain procedures will be balanced against the harm that is caused thereby. *Matthews v. Eldridge*, 424 U.S. 319, 335 (1975) (due process requirements are determined by weighing affected private interests against justification for government actions). *See also Brasfield v. United States*, 272 U.S. 448, 450 (1926), where this Court noted that questioning which reveals the nature or extent of the jury's division "serves no useful purpose." The same analysis has been applied in capital cases to determine whether Eighth Amendment standards have been met. *See Gardner v. Florida*, 430 U.S. 349, 360 (1977) (ordinary purpose of withholding presentence reports from defendants, *i.e.*, for rehabilitation, was not present in a capital case, so that the practice was ground for vacating the death sentence).

In a separate sentencing hearing there is no societal purpose to be achieved by the combination of coercive practices here employed, since the lengthy guilt trial will not be affected. Moreover, in the peculiar circumstances here, where the Louisiana code expressly provided that if the jury was not unanimous a life sentence automatically resulted, there was no purpose whatsoever in applying the slightest coercive practice, no less the repeated and varied efforts here, to bring about unanimity, other than to tip the scales in favor of death.

Moreover, it has been held violative of due process for the trial court to have arbitrarily denied petitioner the

benefit of a state-created procedure, even where it is not so fundamental as the right to a fair and impartial jury trial. *Evitts v. Lucey*, 469 U.S. 387 (1985); *Hicks v. Oklahoma*, 447 U.S. 343 (1980); *see Logan v. Zimmerman Brush Company*, 455 U.S. 422 (1982). This Court in *Hicks* set aside a sentence imposed pursuant to a mandatory sentencing provision of a statute later held unconstitutional by a state court, stating:

> Where . . . a State has provided for the imposition of criminal punishment in the discretion of the trial jury, it is not correct to say that the defendant's interest in the exercise of that discretion is merely a matter of state procedural law. The defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion, and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State.

447 U.S. at 346.

Here petitioner had a "substantial and legitimate expectation" that he would be deprived of his life "only to the extent determined by the jury in the exercise of its statutory discretion" under La. Code Crim. Proc. Ann. art. 905.8. In addition, where the jury was not unanimous, the State criminal code granted the right to a life sentence without parole. Accordingly it is violative of due process for the Court first to have rejected the jury's repeated expressions that it was not unanimous, which under the statute required imposition of a life sentence, and then to have needlessly interfered with the jury's free exercise of discretion by engaging in coercive polling and instructions.

Petitioner's right to a fair and impartial jury, accorded to him by Louisiana law, was violated by the coercive practices at his sentencing. He was thus denied due process of law.

### C. The Sentencing Hearing Violates the Cruel and Unusual Punishment Clause and the Due Process Clause Because It Is Inconsistent With the Principles Established in This Court's Post-*Furman* Capital Punishment Decisions.

For many of the same reasons that the coercive practices at the sentencing hearing violate the standards of due process applicable in all cases, the conduct of that hearing also violates the particular requirements held by this Court to be mandated by the Cruel and Unusual Punishment Clause of the Eighth Amendment.

Where provision is made for a jury determination in a capital sentencing proceeding, the Court has decreed that the "jury must make an '*individualized* determination' of whether the defendant should be executed, based on 'the character of the individual and the circumstances of the crime.'" *Booth v. Maryland*, 55 U.S.L.W. 4836, 4837 (U.S. June 15, 1987), *quoting Zant v. Stephens*, 462 U.S. 862, 879 (1983) (emphasis in original). Nor can the sentencing process create a "constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner." *Id.* The death sentence cannot, consistent with Eighth and Fourteenth Amendment requirements, be imposed "based on considerations that are 'constitutionally impermissible or totally irrelevant to the sentencing process.'" *Booth*, 55 U.S.L.W. at 4837. Plainly, where the jury has been subjected to pressure to return a death verdict, the sentence was not, as constitutionally it "must 'be, and appear to be, based on reason rather than caprice or emotion.'" *Booth*, 55 U.S.L.W. at 4839, *quoting Gardner v. Florida*, 430 U.S. 349, 358 (1977). *See* discussion in Argument, Section I, *supra* at pp. 24-25.

The conduct described here also is inconsistent with the Eighth Amendment's prerequisites to a valid death sentence recently announced in *California v. Brown*, 107 S. Ct. 837, 839 (1987), where the Court refused to disapprove a jury instruction not to be swayed by senti-

ment, conjecture, or public feeling. As Chief Justice Rehnquist for the Court explained, the charge could be interpreted to accord with the requirement that the jury must "ignore emotional responses that are not rooted in the aggravating and mitigating evidence introduced during the penalty phase." 107 S. Ct. at 840. Plainly, the isolation of jurors who are asked to sign their names to slips of paper indicating that they are the holdouts, followed by a blasting charge and the other circumstances here, introduced "extraneous emotional factors," *id.* at 840, that undermined the fundamental protection against administering the death penalty "in an arbitrary and unpredictable fashion." *Id.* at 839.

While Louisiana insists that it is proper to permit a court to urge a unanimous verdict upon a jury whose inability to agree results by statute in an automatic life sentence, in contrast, the highest courts of Florida, Delaware and New Jersey have held it to be coercive and without legitimate purpose to press the jury to strive toward unanimity in the face of such a statutory requirement. *Rush v. State*, 491 A.2d 439 (Del. 1985); *Rose v. State*, 425 So. 2d 521 (Fla. 1982), *cert. denied*, 461 U.S. 909 (1983); *State v. Ramseur*, 106 N.J. 123, 524 A.2d 188, 285 (1987). The awesome consequence of intervening in a deliberation of life or death influenced these courts in holding such coercion to be "fatal". *Rush*, 491 A.2d at 453. *See Caldwell v. Mississippi*, 472 U.S. 320, 333-34 & nn.4 & 5 (1985) (citing state court opinions as support for holding death sentence unconstitutional where prosecutor told jury that final determination of capital defendant's fate lay in hands of appellate court and not in theirs).

Because this is a capital case, especially strict scrutiny must be given to any practice tending to coerce the jury by subjecting it to influences other than the law and the evidence adduced at trial. *See, e.g., Beck v. Alabama*, 447 U.S. 625, 637 (1980) (because of the "significant constitutional difference" between death and other punish-

ments, the risk of an unwarranted conviction "cannot be tolerated in a case in which the defendant's life is at stake"); *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977) (because the death penalty "differs dramatically" from any other state action, it is "of vital importance to the defendant and to the community that any decision to impose the death penalty be, and appear to be, based on reason rather than caprice or emotion"); *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) ("When a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed"); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (because of the qualitative difference between capital and non-capital cases, there "is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case"); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) ("We are satisfied that this qualitative difference between life and death calls for a greater degree of reliability when the death sentence is imposed.").

Accordingly, applying the heightened need for reliability, and the criticality of avoiding extraneous and emotional considerations in a death sentence proceeding, the circumstances here—which in their totality could not pass muster in a non-capital case—should be deemed to have violated the Due Process Clause of the Fourteenth Amendment, the Sixth Amendment right to a fair and impartial jury and the Eighth Amendment prerequisites to imposition of a valid death sentence.

**II. Petitioner's Death Sentence, Based on a Sole Statutory "Aggravating" Circumstance That Merely Repeats an Element of the Crime, Violates the Eighth Amendment Requirement that Sentencer Discretion Be Directed and Limited So As to Minimize the Risk of Arbitrary and Capricious Executions.**

The Louisiana capital sentencing scheme, as applied to petitioner, gave the capital sentencer unbridled discretion to impose the death penalty, in violation of well-settled

Eighth Amendment doctrine. Petitioner is sentenced to die solely on the basis of a jury finding of a single statutory "aggravating" circumstance that is identical to a crucial element of the capital crime for which he was being sentenced. No other aggravating circumstance supports a sentence of death. As a result, the jury was permitted to impose the death sentence by merely confirming its finding of guilt.

The Louisiana statutory "aggravating" circumstance found here did not "genuinely narrow" the class of death-eligible persons. *Zant v. Stephens*, 462 U.S. 862, 877 (1983). By failing to channel and limit juror discretion within permissible bounds through the provision of appropriate legislative standards for selecting who should die among those convicted of murder, the Louisiana statutory scheme, as applied here, suffers from the same infirmity as the discretionary-sentencing statutes invalidated by this Court in *Furman v. Georgia*, 408 U.S. 238 (1972), and is therefore unconstitutional. The Louisiana capital sentencing procedure, as applied here, impermissibly failed to provide a rational basis for distinguishing the cases where the death penalty is imposed from those where it is not for the same offense. *See Furman v. Georgia*, 408 U.S. 238, 313 (White, J., concurring). The application of that scheme also allowed the sentencer to avoid the constitutionally mandated responsibility of engaging in an individualized deliberative process that squarely confronted the "awesome responsibility of decreeing death for a fellow human." *Caldwell v. Mississippi*, 472 U.S. 320, 329-330 (1985), *citing McGautha v. California*, 402 U.S. 183, 208 (1971).

### A. The Louisiana Statute Permitted a Sentence of Death To Be Imposed In This Case Based Upon An "Aggravating" Circumstance That Merely Repeats An Element of the Crime.

The Louisiana statute defines five categories of homicide as first-degree murder. One of these categories is the

killing of a human being when the offender has a "specific intent to kill or to inflict great bodily harm upon more than one person." La. Rev. Stat. Ann. § 14:30A(3) (West 1986).[16] If a person is found guilty of any one of the five categories of homicide set forth in the statute, a new hearing before the same jury is then required to determine the appropriate sentence. In a sentencing hearing, the jury is given the discretion to impose the death penalty if it finds beyond a reasonable doubt the existence of one or more of ten statutorily delineated aggravating circumstances. La. Code Crim. Proc. Ann. art. 905.3 and 905.4 (West 1984 & Supp. 1986).[17]

The jury must also "consider" any mitigating circumstances,[18] although it is not required to enumerate its findings in this regard. La. Code Crim. Proc. Ann. art. 905.3 (West 1984 & Supp. 1986). Nor must the jury weigh or balance the aggravating against the militating factors by any statutory standards. *Id.* So long as a Louisiana jury finds that a single statutory aggravating circumstance exists, as it did here, it can sentence the

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[16] The remaining classes of first-degree murder in Louisiana are killing in connection with the commission of certain felonies, killing of a fireman or peace officer in the performance of his or her duty, killing for remuneration, and killing an individual under the age of twelve. La. Rev. Stat. Ann. § 14:30A (West 1986).

[17] The Louisiana statute enumerates ten aggravating circumstances, which are delineated in full in the statutory appendix to this brief. Petitioner was sentenced on the basis of the statutory aggravating circumstance which provides:

> (d) the offender knowingly created a risk of death or great bodily harm to more than one person.

La. Code Crim. Proc. Ann. art. 905.4 (West 1984 & Supp. 1986).

[18] The Louisiana Code of Criminal Procedure provides that, "A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and, after consideration of any mitigating circumstances, recommends that the sentence of death be imposed." La. Code Crim. Proc. Ann. art. 905.3 (West 1984 & Supp. 1986).

defendant to death, regardless of the presence of any mitigating factors. *Id.*

Here, petitioner was convicted of three counts of first-degree capital murder. (J.A. at 5-6). An essential element of each guilt determination was the jury's finding that petitioner killed with the "specific intent to kill or to inflict great bodily harm upon more than one person." La. Rev. Stat. Ann. § 14:30A(3) (West 1986). As part of its brief presentation of argument and evidence at the sentencing proceeding, the State simply referred to the evidence it had already presented during the guilt phase and little else.[19] (J.A. at 37-38). The prosecutor plainly told the jury that, to impose the death penalty, it need only find again as an aggravating circumstance the very element it had just determined to exist as part of its guilty verdict. (J.A. at 38).

As it was authorized to do under the Louisiana statute, the jury in the sentencing phase merely echoed the determination it had made at the guilt stage. It found only one aggravating circumstance as to all of the counts of murder: that "the offender knowingly created a risk of death or great bodily harm to more than one person." (J.A. at 57-58). On this basis the jury imposed a sentence of death on petitioner.[20]

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[19] The only other evidence offered by the State was a ten-year-old Canadian conviction for attempted rape and an indictment against the petitioner for earlier harassment of the principal victim. (J.A. at 37). This evidence did not support the jury's finding of an aggravating circumstance. *See* n.20, *infra*. Petitioner's trial counsel, reminding the jury that they had deliberated in the guilt phase for thirteen hours, urged the jury to permit any lingering doubts to surface in arriving at an appropriate sentence. (J.A. at 39). *See generally Lockhart v. McCree*, 106 S. Ct. 1758, 1768-69 (1986) (adverting to "residual doubts" as "effective" mitigating argument).

[20] While as to one of the three first-degree murder counts the jury found the additional statutory aggravating factor that "the victim was a witness in a prosecution against the defendant," La. Code Crim. Proc. Ann. art. 905.4(h) (West 1984 & Supp. 1986), the

### B. The Eighth Amendment Requires that a Sentence of Death Be Based on At Least One Aggravating Circumstance That Genuinely Narrows the Death-Eligible Class From Among Convicted Murderers.

Fifteen years ago in *Furman v. Georgia*, 408 U.S. 238 (1972), this Court held that the Eighth Amendment does not allow a jury to find a defendant's guilt "and then, without guidance or discretion" decide whether he should live or die. *Gregg v. Georgia*, 428 U.S. 153, 197 (1976) (plurality opinion). Since *Furman*, this Court's modern capital punishment doctrine has been rooted in the recognition that the qualitative difference of death from all other punishments demands an enhanced need for reliability in capital sentencing determinations. *See, e.g., California v. Ramos*, 463 U.S. 992, 998-99 (1983); *Eddings v. Oklahoma*, 455 U.S. 104, 117-118 (1982) (O'Connor, J., concurring); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (Opinion of Burger, C.J. and Stewart, Powell, & Stevens, JJ.). The Louisiana statute must be evaluated in light of this stringent requirement.

As this Court has recently reaffirmed, one of the fundamental principles that must guide capital sentencing is that:

> sentencers may not be given unbridled discretion in determining the fates of those charged with capital offenses. The Constitution instead requires that death penalty statutes be structured so as to prevent

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Louisiana Supreme Court, on direct review of petitioner's conviction and sentence, found that the evidence was insufficient, as a matter of state law, to support this finding. *State v. Lowenfield*, 495 So. 2d 1245, 1256 (La. 1985), *cert. denied*, 106 S. Ct. 2259 (1986).

The jury explicitly rejected the State's argument that petitioner had a significant prior history of criminal activity, an aggravating factor on which it was also specifically instructed. (J.A. at 57-58).

The Louisiana Code does not authorize the jury to consider aggravating circumstances that are not expressly listed in the statute. *See* La. Code Crim. Proc. Ann. art. 905.4 (West 1984 & Supp. 1986).

> the penalty from being administered in an arbitrary and unpredictable fashion. *Gregg v. Georgia*, 428 U.S. 153 (1976); *Furman v. Georgia*, 408 U.S. 238 (1972).

*California v. Brown*, 107 S. Ct. 837, 839 (1987).

In applying this constitutional requirement, the Court has, on the one hand, prohibited states from considering any crime—no matter how narrowly defined—so serious that every person who commits it should be put to death. *See Sumner v. Shuman*, 55 U.S.L.W. 4931 (U.S. June 22, 1987) (invalidating statute mandating death for life term prisoners who commit murder); *Roberts (Harry) v. Louisiana*, 431 U.S. 633 (1977) (invalidating statute mandating death for murder of a peace officer); *Roberts (Stanislaus) v. Louisiana*, 428 U.S. 325 (1976) (invalidating statute mandating death for first-degree murders defined in the same manner as they are in the instant case). On the other hand, the Court, mindful of the need to direct and limit the sentencer's discretion, has required capital sentencing statutes to specify aggravating circumstances for the purpose of aiding in the rational selection of who among those convicted of murder should be singled out for the ultimate and irrevocable penalty of death. *Zant v. Stephens*, 462 U.S. 862, 878 (1983) ("aggravating circumstances play a constitutionally necessary function").

In order to satisfy the Court's mandate in *Furman*, such aggravating circumstances

> must be genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.

*Zant v. Stephens, supra* at 877 (1983). Thus in *Gregg v. Georgia*, 428 U.S. 153 (1976), the Court found Georgia's capital sentencing scheme constitutional on its face,

in large measure because it provided for a "bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information." 428 U.S. at 195.[21] These "clear and objective standards," focusing on the specific circumstances of the crime and the character of the offender, are enforced through the requirement that the sentencer "find a *statutory* aggravating circumstance before recommending a sentence of death." 428 U.S. at 197 (emphasis in original). *See also Zant v. Stephens*, 462 U.S. at 876 ("The approval of Georgia's capital sentencing procedure rested primarily on . . . [the requirement] that the jury . . . find at least one valid statutory aggravating circumstance"). A statutory aggravating circumstance "must satisfy a constitutional standard derived from the principles of *Furman* itself" in guiding the sentencer in the selection of whether one convicted of murder should live or die. *Zant v. Stephens, supra* at 876.

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[21] *See also McCleskey v. Kemp*, 55 U.S.L.W. 4537, 4543 (U.S. April 22, 1987), *quoting Gregg v. Georgia*, 428 U.S. at 196 ("a State must 'narrow the class of murderers subject to capital punishment,' by providing 'specific and detailed' guidance to the sentencer").

The importance of the constitutional requirement of a sentencer finding of a meaningful statutory aggravating circumstance that genuinely narrows the death-eligible class is highlighted by the Court's subsequent holdings that other elements of the Georgia capital sentencing scheme, upheld in *Gregg*, were not constitutionally required. The Court has held that, once jury discretion has been initially checked in this manner, there is no constitutional reason to limit the additional aggravating circumstances a jury may consider. *Barclay v. Florida*, 463 U.S. 939 (1983). The Court has also held that the Eighth Amendment does not require any particular form of capital sentencing review. *Pulley v. Harris*, 465 U.S. 37 (1984). The need for a sentencer finding of a meaningful statutory aggravating circumstance therefore assumes even greater importance as the only significant means for addressing *Furman*'s concerns.

A jury's finding of a statutory aggravating circumstance will not provide sufficient constitutional assurance of the reliabiilty of the sentence, as *Furman* requires, if the aggravating circumstance fails meaningfully to guide and instruct the sentencer by narrowing the death-eligible class from all who are convicted of murder. In *Godfrey v. Georgia*, 446 U.S. 420 (1980), the petitioner was sentenced to death on a jury finding of the single aggravating circumstance that the murders were "outrageously or wantonly vile, horrible and inhuman." 446 U.S. at 425-26. The Court found that this statutory aggravating circumstances had been construed so broadly as to apply to virtually every case. *Id.* at 432-33. In particular, the *Godfrey* plurality held that the overly broad statutory aggravating circumstance fostered "standardless and unchanneled imposition of death sentences in the uncontrolled discretion of a basically uninstructed jury. . . ." *Id.* at 429.

As the cases discussed above indicate, this Court has consistenly required that meaningful statutory aggravating circumstances are the constitutional touchstone to guide the sentencer in a capital case. Here, because the sole statutory aggravating circumstance for which the petitioner has been singled out to die provides "no principled way to distinguish this case, in which the death penalty was imposed, from the many in which it was not," *id.* at 433 (opinion of Stewart, Blackmun, Powell, and Stevens, JJ.), this requirement is violated and petitioner's death sentence may not stand.

### C. The Louisiana Jury Exercized Untrammeled Discretion in Its Sentencing Determination.

The Court's admonition in *Furman* and subsequent cases—establishing that states must first define a class of defendants who are eligible for the death penalty and then provide meaningful standards to guide jury discretion in selecting which individuals within this class should die—is violated by the application of Louisiana's statute to

the petitioner in this case. The sentencing jury was not properly guided in exercising its discretion. Under the Louisiana statutory scheme described in Section II, A, *supra*, the sole aggravating factor on which petitioner's death sentence was ultimately based was identical to the crime which the jury had just found he had committed. Having found in the guilt phase of petitioner's trial that petitioner was guilty of murder because he had intended to inflict death or great bodily harm on more than one person, the jury was told, without any further guidance, that it could impose a sentence of death if it once again made the finding it had just made—that petitioner had intended to inflict death or great bodily harm on more than one person.[22]

The jury was given no basis for selecting petitioner, unlike others convicted of first degree murder in Louisiana, as particularly deserving to die. These deficiencies in the sentencing proceeding were compounded by the freedom the jury had—once it reaffirmed its guilt phase determination—to reach a sentencing decision without even weighing aggravating against mitigating factors.[23] In the circumstances of this case, the sentencing proceeding was a charade, devoid of any "genuine narrowing"

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[22] Although the jury scarcely needed reminding that it had just made this finding in the guilt phase, the prosecutor nevertheless so reminded it. J.A. at 38.

[23] Once having "considered" mitigating circumstances, pursuant to Article 905.3 of the Louisiana Code of Criminal Procedure, the jury was without any further guidance and could accord mitigating factors little or no significance. There appears to be some degree of confusion on these precise requirements under Louisiana law. *Compare State v. Loyd*, 489 So. 2d 898 (La. 1986), *cert. denied*, 107 S. Ct. 1984 (1987) (some amount of jury weighing is implicit in the requirement that a sentencing jury "consider" mitigating circumstances), *with Flowers v. State*, 441 So. 2d 707 (La. 1983), *cert. denied*, 466 U.S. 945 (1984), *citing State v. Welcome*, 458 So. 2d 1235 (La. 1983), *cert. denied*, 470 U.S. 1088 (1985) (holding that there is no requirement that the jury find beyond a reasonable doubt that aggravating circumstances outweigh mitigating circumstances prior to recommending a death sentence).

of jury discretion demanded by *Furman* and subsequent cases. In substance, the proceeding was virtually identical in practice to the pre-*Furman* sentencing proceedings in which a defendant was free to beg for mercy, but the jury was given no guidance whatsoever in distinguishing those who deserved death from those who did not. Petitioner's death sentence therefore violates the Eighth Amendment.

### D. Any Arguable Legislative Narrowing At the Guilt Stage Fails to Satisfy *Furman*'s Mandate For Reliable Capital Sentencing.

The precedents discussed in Part II, B, *supra*, make plain that the Eighth Amendment requires a carefully regulated sentencing process above and beyond the guilt-finding process in capital cases. Yet the Fifth Circuit, in rejecting petitioner's claim, embraced the notion that Louisiana's detailed definitions of capital murder themselves satisfy Eighth Amendment concerns over sentencing discretion. *Lowenfield v. Phelps*, 817 F.2d 285, 289 (5th Cir. 1987). In so doing, the Fifth Circuit extended its ruling in *Wingo v. Blackburn*, 783 F.2d 1046, 1051 (5th Cir. 1986), *cert. denied*, 107 S. Ct. 1984 (1987) to the situation where there is a complete overlap between the definition of the capital crime and any statutory aggravating circumstances found by the sentencer.

The Eighth Circuit properly rejected the Fifth Circuit's approach in *Collins v. Lockhart*, 754 F.2d 258 (8th Cir.), *cert. denied*, 106 S. Ct. 546 (1985). The Eighth Circuit held that duplicative aggravating circumstances fail to perform the constitutionally mandated task of providing sentencer guidance in narrowing the death-eligible class from among those convicted of murder. 745 F.2d at 264.[24]

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[24] The *Collins* court was persuaded of this constitutional shortcoming where only one of three statutory aggravating circumstances identified by the jury duplicated the definition of the crime itself. 754 F.2d at 263. This Court need not affirm *Collins* in order to vacate petitioner's sentence. Here, the definition of petitioner's crime is identical to the sole aggravating circumstance found by the

This Court's post-*Furman* precedents indicate that while a finding of an "intention to inflict great bodily injury on more than one person" arguably might satisfy *Furman*'s requirement for a reasonable narrowing criterion, contrary to the Fifth Circuit's suggestion in *Blackburn, supra*, it does not erase the need for a full and meaningful finding of a constitutionally proper aggravating circumstance by an authority consciously engaged in the act of sentencing. Indeed to ignore the role of the sentencer in determining the presence or absence of aggravating factors at the penalty phase would be to repudiate this Court's consistent holdings, culminating just last Term in *Sumner v. Shuman*, 55 U.S.L.W. 4931 (U.S. June 22, 1987), that "narrowly drawn" statutory definitions of "capital murder" cannot, consistent with the Eighth Amendment, replace the need for the exercise of focused discretion at the sentencing stage.

The very Court that decided *Furman* promptly and unequivocally held in other capital cases that the rule laid down in *Furman* could not be satisfied simply by narrowing the definition of a "capital" crime. *Furman*'s invalidation of a Georgia statute applicable to murder generally was immediately perceived by the Court as also governing more narrow *first-degree* murder statutes. *See, e.g., Moore v. Illinois*, 408 U.S. 786, 800 (1972) (invalidating death sentence); *Scoleri v. Pennsylvania*, 408 U.S. 934 (1972) (*per curiam*) (invalidating death sentence). *Furman* was also understood to govern statutes with even narrower definitions of capital crimes. *See, e.g., Duling v. Ohio*, 408 U.S. 936 (1972) (*per curiam*), *summarily rev'g* 21 Ohio St. 2d 13, 254 N.E.2d 670 (Ohio 1970) (striking down statute that permitted a death sentence if the jury found that the victim of the murder was a police officer). The *Furman* Court itself, through these actions, expressed the requirement that legislative channeling of

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sentencer—with nothing else supporting his sentence of death—so that petitioner's sentence is even more clearly constitutionally infirm.

discretion must be addressed to sentencing, rather than merely to the definition of the capital crime.

The ineffectiveness of narrowing the definition of the capital crime to satisfy *Furman*'s concerns was undersored by the Court's analysis of the statutes in the 1976 companion cases that revalidated the death penalty. Several of these statutes featured narrowed definitions of murder, similar to the Louisiana statute here. In response to *Furman*, Louisiana limited capital homicides to five categories of intentional and knowing murders nearly identical to those delineated in the current Louisiana first-degree murder statute. But in *Roberts v. Louisiana*, 428 U.S. 325 (1976), the Court made clear that such narrowing at the guilt stage alone fails to provide constitutionally adequate legislative guidance on *sentencing*:

> lack of focus on the circumstances of the particular offense and the character and propensities of the offender . . . is not resolved by Louisiana's limitation of first-degree murder to various categories of killing.

*oberts v. Louisiana*, 428 U.S. at 333 (Stewart, Powell & evens, JJ.). And, as the dissenters in *Roberts* recognized, that decision held Louisiana's statute unconstitutional "for want of a separate sentencing proceeding in which the *sentencing authority may focus on the sentence* and consider some or all of the *aggravating* and mitigating circumstances." *Id.* at 356 (dissenting opinion) (emphasis added).[25]

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[25] Louisiana's current statute does not appear to have been the product of careful legislative crafting to satisfy the *Furman* Court's penalty-phase concerns. In 1973, the Louisiana legislature amended the state murder statutes and created the narrowly defined crime of first-degree murder, *see Roberts v. Louisiana*, 428 U.S. 325, 328-29 (1976) (Opinion of Stevens, Stewart, and Powell, JJ.), while at the same time making a death penalty for such crimes mandatory in an effort to eliminate juror discretion. La. Rev. Stat. Ann. § 14:30 (1974). The Court invalidated this mandatory statute in *Roberts v. Louisiana*, 428 U.S. 325 (1976). In response, Louisiana adopted a statute almost identical to Georgia's revised law. La. Acts 1976, No. 657, *amending* La. Rev. Stat. §§ 14:30 (1950) and

Nor does this Court's approval of the Texas death penalty statute in *Jurek v. Texas*, 428 U.S. 262 (1976), validate the process by which petitioner was sentenced to death. The Court in *Jurek* held that the Texas statute was constitutional where it required the sentencing jury to answer three questions—clearly focused on sentencing—after its finding of guilt. These questions include whether the convicted murderer would "constitute a continuing threat to society" because of a probability that he or she "would commit [future] criminal acts of violence." Tex. Crim. Proc. Code Ann. § 37.071b(2) (Vernon Supp. 1975-1976). In contrast, the Louisiana statute, as applied to petitioner, failed to require any additional meaningful sentencing inquiry.

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30.1 (Supp. 1973). *See* Note, *The Work of the Louisiana Legislature for the 1976 Regular Session—A Student Symposium*, 37 La. L. Rev. 89, 197-198 (1976).

In 1977, the Louisiana Legislature explicitly amended its definition of *second*-degree murder to include all homicides where the offender has a specific intent to kill but where the aggravating circumstances listed in the capital sentencing portion of the statute were not present. *See* Comment, *First-Degree Murder Statutes and Capital Sentencing Procedures: An Analysis and Comparison of Statutory Systems for the Imposition of the Dealth Penalty in Georgia, Florida, Texas and Louisiana*, 24 Loy. L. Rev. 709, 738 (1978). This change was not enacted to limit in any fashion sentencer discretion, but was instead adopted to facilitate prosecutors' efforts to obtain plea bargains, by their being able to offer a noncapital alternative. *See* C. Hancock, *The Perils of Calibrating the Death Penalty Through Special Definitions of Murder*, 53 Tul. L. Rev. 828, 855 n.88 and 859 n.104 (1979). The Louisiana Supreme Court then interpreted this statutory change as an amendment by implication of the State's first-degree murder statute, so as to incorporate the sentencing aggravating circumstances into the definition of *first*-degree murder itself, because second-degree murder excludes such factors. *State v. Payton*, 361 So. 2d 866, 870 (La. 1978). The Louisiana Legislature then codified this interpretation in 1979. *See* Hancock, 53 Tul. L. Rev. at 861 n.108. This tortuous history of the source of the duplication between aggravating circumstances and the definition of capital murder is devoid of any legislative intent to channel juror discretion at the guilt stage of a capital proceeding.

The Court's plurality opinion first suggested that the legislature's narrowing the categories of murders for which a death sentence may ever be imposed may serve "much the same purpose" as a list of statutory aggravating circumstances.[28] 428 U.S. at 270 (Opinion of Stewart, Powell and Stevens, JJ.). Turning its attention to the additional questions the sentencing jury was required to answer, the plurality concluded that these questions were adequate to satisfy *Furman*. *Id.* at 274-76. Although the *Jurek* plurality focused on whether these questions encompass consideration of mitigating circumstances, both this Court and the Texas appellate court have recognized that these questions require a Texas sentencing jury to focus on aggravating as well as mitigating circumstances. *Skipper v. South Carolina*, 106 S. Ct. 1669, 1671 (1986); *Estelle v. Smith*, 451 U.S. 454, 472-73 (1981); *Adams v. Texas*, 448 U.S. 38, 46 (1980); *Jurek v. State*, 522 S.W.2d 934, 939-40 (Tex. Crim. App. 1975). Thus, *Jurek* provides no support for removing meaningful consideration of aggravating factors from the sentencing jury.

Moreover, the plurality's remark about the role played by the jury at the guilt phase in identifying aggravating factors must be understood in the particular context of the Texas statutory scheme. The Texas jury in *Jurek* was specifically informed before the trial that a guilt finding would qualify the defendant for consideration for the death penalty. *Jurek v. State*, 552 S.W.2d 934, 938 (Tex. Crim. App. 1975). The jury acquired this information as a result of guidance in the Texas statute, which provided:

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[28] The Court's language in *Jurek* cannot, of course, be understood in isolation. It must be read together with the Court's statements in the more extensive 1976 companion cases. In *Jurek*, the Court had no need to reiterate the principles it clearly set forth in *Gregg v. Georgia*, 428 U.S. 153 (1976), most notably the explicit requirement that a jury find a statutory aggravating circumstance before recommending a sentence of death. *See* 428 U.S. at 197.

> Prospective jurors shall be informed that a sentence of life imprisonment or death is mandatory on conviction of a capital felony. A prospective juror shall be disqualified from serving as a juror unless he states under oath that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact.

Texas Penal Code Ann. § 12.31(b) (Vernon 1974). *See generally Adams v. Texas*, 448 U.S. 38 (1980) (discussing operation of this statutory provision). The Texas jury, even in making its initial guilt determination, was given guidance allowing it to focus on relevant sentencing considerations.

In contrast, petitioners' Louisiana jury had no similar indication that its initial guilt phase finding of an aggravating circumstance would effectively control its sentencing determination and that the jury would be uninstructed in reevaluating this finding. The jury's initial guilt determination in petitioner's case—which incidentally found an element that was identical to that in an aggravating circumstance—did not have any role in guiding jury *sentencing* discretion in selecting petitioner for the death sentence. The jury did not understand that—at the guilt phase—it was engaged in a process that would ultimately control the question whether petitioner should live or die. Indeed, the judge explicitly told the jury to completely ignore any penalty consequences of its guilt phase determination, Trial Transcript of May 14, 1984 at 57, as he properly should have, in view of the statutory requirement that the guilt and penalty considerations are to be made separately. Thus, unlike in *Jurek*, there was no room for the jurors to exercise their full range of judgment at the penalty phase. *See Adams v. Texas*, 448 U.S. at 47.

Accordingly, legislative narrowing at the guilt stage failed to provide any constitutional basis for sentencing petitioner to death.

### E. Upholding the Decision Below Would Set into Process An Intrusive Constitutional Inquiry into the Adequacy of State Substantive Criminal Laws.

Since 1972, the Court has striven to clarify and settle the meaning of *Furman v. Georgia*, 408 U.S. 238 (1972). In so doing, it has focused its Eighth Amendment constitutional inquiry on the adequacy of state *procedures* in preventing the risk of arbitrary and capricious sentencing. *See, e.g., California v. Ramos*, 463 U.S. 992, 999 (1983) ("In ensuring that the death penalty is not meted out arbitrarily or capriciously, the Court's principal concern has been more with the *procedure* by which the State imposes the death sentence than with the substantive factors the State lays before the jury as a basis for imposing death, once it has been determined that the defendant falls within the category of persons eligible for the death penalty") (emphasis in original); *Barclay v. Florida*, 463 U.S. 939, 963 (1983) (Stevens and Powell, JJ., concurring); *Gregg v. Georgia*, *supra*, 428 U.S. at 179 (Opinion of Stewart, Powell, and Stevens, JJ.).

To shift the long-standing focus in death penalty cases from the process of selecting which defendants convicted of murder shall die to a review of the definition of capital murder would invite a protracted inquiry into the adequacy of state substantive criminal laws. For this Court to suggest that Louisiana's definition of capital homicide, which purports to transplant Eighth Amendment procedural requirements into the substantive criminal law, is "narrow enough" to satisfy the concerns of *Furman*—without requiring the finding of any non-duplicative statutory aggravating circumstances—would oblige the Federal courts similarly to determine whether the wide variety of state capital murder statutes—with elaborate definitions somewhere between the narrowness of the Louisiana and the broadness of the Georgia statutes—are also "narrow enough" to pass constitutional muster.

This course of inquiry, due to its substantive focus, would run contrary to fundamental notions of federalism.

*See, e.g., Tigner v. Texas*, 310 U.S. 141, 149 (1940) (substance of state criminal law is a matter of unique legislative competence). The Court would also be embarking on an entirely new course of constitutional adjudication, because it would be required to make these determinations on the basis of standards that are not enunciated in *Furman* or in any other of its capital decisions. On the contrary, a holding that enforces the requirement of standardized selection from the death-eligible class by reaffirming what the Court has already made apparent in *Zant*, *Godfrey*, and *Gregg* would accord with the Court's death penalty constitutional jurisprudence and would aid in further settling the meaning of this Court's action in *Furman v. Georgia*.

**F. The *Pro Forma* Consideration Given to Aggravating Circumstances at Petitioner's Sentencing Hearing Denied Due Process.**

Even if the Eighth Amendment does not, as petitioner contends, require a sentencing jury to find aggravating circumstances before sentencing a convicted murderer to death, Louisiana law requires the sentencing jury to make such a finding at that stage of a capital trial. Under Article 905.3 of Louisiana's Code of Criminal Procedure, the sentencing jury may not impose the death penalty unless it finds, beyond a reasonable doubt, a statutorily-enumerated aggravating factor. This requirement was subverted because the jury's sentencing phase finding was, at best, a mere echo of its guilt phase decision on the identical aggravating circumstance. At worst, the jury's decision was the product of utter confusion because it had no way to understand the legal effect of its prior guilt phase determination of the identical "aggravating" finding. Because of the absence of useful instruction, the jury's sentencing determination failed to come to grips with the "awesome responsibility of decreeing death for a fellow human." *Caldwell v. Mississippi*, 472 U.S. 320, 329-330 (1985), *citing McGautha v. California*, 402 U.S. 183, 208 (1971).

Fundamental principles of procedural fairness apply with no less force at the penalty phase of a trial in a capital case than they do in the guilt-determining phase of any criminal trial. *Presnell v. Georgia*, 439 U.S. 14, 16 (1978).[27] Having required the sentencing jury to make a finding on an aggravating circumstance, the state was obliged to assure that such a finding was made in accordance with due process. *See, e.g., Evitts v. Lucey*, 469 U.S. 387, 401 (1985); *Logan v. Zimmerman Brush Company*, 455 U.S. 422, 432-34 (1982); *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980). Even had the sentencing jury not been coerced, as described in Part I, *supra*, petitioner's sentencing proceeding was devoid of the necessary character and focus of a meaningful sentencing inquiry and so heavily stacked against petitioner as to amount to a charade.

At petitioner's sentencing hearing, both Louisiana law and the Due Process clause required the prosecution to establish to the satisfaction of a jury the existence of a statutory aggravating factor, and to do so beyond a reasonable doubt.[28] In American criminal jurisprudence the jury's fundamental function is "to maintain a link between contemporary community values and the penal system," *Witherspoon v. Illinois*, 391 U.S. 510, 519 n.15 (1968), and to "stand between the accused and a poten-

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[27] *See also Arizona v. Rumsey*, 467 U.S. 203, 212 (1984) (double jeopardy protections attach at the penalty phase of a capital trial "because [the capital sentencing] proceeding is like a trial"); *Bullington v. Missouri*, 451 U.S. 430 (1981) (same); *Estelle v. Smith*, 451 U.S. 454 (1981) (Fifth and Sixth Amendment rights apply at the penalty phase of a capital proceeding).

[28] The Constitution arguably does not require any particular standard for balancing aggravating against mitigating factors. *See Zant v. Stephens*, 462 U.S. at 875 n.13; *Ford v. Strickland*, 696 F.2d 804, 817-19 (11th Cir.) (*en banc*), *cert. denied*, 464 U.S. 865 (1983). It does, however, require adequate proof of the truth of the factors upon which the State relies in seeking to impose the death penalty. *See In re Winship*, 397 U.S. 358 (1970); *Presnell v. Georgia*, 439 U.S. 14 (1978).

tially arbitrary or abusive Government that is in command of the criminal sanction," *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572 (1977). Moreover, when, as in Louisiana, a jury is given the "awesome responsibility" of determining the appropriateness of death, its consideration must embrace a reasonable moral inquiry, *California v. Brown*, 107 S. Ct. 837, 841 (1987) (O'Connor, J., concurring), into the myriad of circumstances involving the defendant's background, character, and the circumstances of the crime, *Woodson v. North Carolina*, 428 U.S. 280, 304, (1976), and must engage in this task with full awareness of the nature of its responsibility, the gravity of its task, and the consequences of its actions. *Caldwell v. Mississippi*, *supra* at 329-330, 341. *See also Lockhart v. McCree*, 106 S. Ct. at 1770 n.18 (recognizing that jury role in sentencing is broader than in guilt/innocence determination); *State v. Williams*, 392 So. 2d 619, 634-35 (La. 1980) (due process requires that sentencing jury be informed of consequences of its decision). At a minimum, these requirements must mean that the jury must consider aggravating factors freshly and that its findings must not be foreordained by findings previously made. *See, e.g., Sparf v. United States*, 156 U.S. 51 (1895) (directed verdict forbidden in criminal case). Louisiana's Supreme Court itself has recognized that sentencing juries may not, constitutionally, be "bound" by findings made at the guilt-determining stage. *State v. Knighton*, 436 So. 2d 1141 (La. 1983), *cert. denied*, 465 U.S. 1051 (1984); *State v. Clark*, 387 So. 2d 1124, 1132 (La. 1980), *cert. denied*, 449 U.S. 1103 (1981).

In convicting petitioner of the crime of murder the guilt-determining jury necessarily found that petitioner had intended to inflict death or bodily injury on more than one person. The guilt phase determination of a statutory aggravating circumstance—totally devoid of any consideration of the appropriate penalty—never was envisioned as satisfying the sentencing protections held

out by Louisiana's statute. It is inconceivable that the same jurors, sitting three hours later as the sentencing jury, could have independently considered this issue at the sentencing stage and *not* considered itself "bound" by its prior finding. This is especially so where the jury was left uninstructed as to the weight it should give its prior finding.[29] The jury was unaware that it could and should "exercise a range of judgment and discretion while remaining true to [its] instructions and [its] oaths," in deciding upon an appropriate sentence. *Adams v. Texas*, 448 U.S. 38, 47 (1980). And in the context of the pressures exerted on the "great[ly] distress[ed] [and] unbalance[d]" jury, as discussed in Section I, *supra*,—making it impossible for the holdout jurors to sustain their position that death was inappropriate—the jury's sentencing determination was wholly inadequate.

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[29] The trial judge's general charge on "reasonable doubt" made no reference to the jury's prior findings, and a lay jury could scarcely be thought to have inferred from this general charge that it would not be bound by prior findings that it had just made "beyond a reasonable doubt." *See Gregg v. Georgia*, 428 U.S. 153, 192 (1976) (clear sentencing guidelines essential to aid a jury in understanding complex legal principles). Nor was the prosecutor's remark that the jury needed to "reconsider" its earlier finding at all adequate to cure this deficiency. Reconsideration implies only "another look" and does not request the decisionmaker to exercise an independent judgment. *See Walker v. Jim Dandy Co.*, 97 F.R.D. 505, 507, 511 (N.D. Ala. 1983), *aff'd in part and rev'd in part on other grounds*, 747 F.2d 1367 (11th Cir. 1984).

Any instruction that the jury was not bound by its guilt phase determination of the identical aggravating circumstance, without any further instruction on the difference in the nature of its guilt and sentencing judgments, would be problematic because it would invite the jury to disregard the evidence, a result the Eighth Amendment cannot tolerate. *See, Woodson v. North Carolina*, 428 U.S. 280, 302-303 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) (potential for juror nullification may invalidate death penalty statute), *Roberts v. Louisiana*, 428 U.S. 325, 335 (1976) (opinion of Stewart, Powell and Stevens, JJ.) (same). *Cf. California v. Brown*, 107 S. Ct. 837 (1987) (upholding instruction designed to discourage nullification).

As a consequence of the circumstances discussed above, the Louisiana statute's promise to the petitioner of a carefully focused jury sentencing determination—reflecting full cognizance of the solemn gravity of its task—was never fulfilled. The injection of the sole identical insufficient "aggravating" circumstance into the penalty phase made a mockery of petitioner's sentencing proceeding and perpetuated the Eighth Amendment and due process constitutional deficiencies by "simply paper[ing] over the problem of unguided and unchecked jury discretion." *Gregg v. Georgia*, 428 U.S. at 302 (opinion of Stewart, Powell, and Stevens, JJ.).

## CONCLUSION

For the reasons set forth above, petitioner was unconstitutionally sentenced to die by a coerced jury that, as a result of the Louisiana sentencing statute, was not required to come to terms with petitioner's appropriate sentence. On each and both of these grounds, petitioner's sentence of death must be vacated and the decision below of the United States Court of Appeals for the Fifth Circuit must be reversed.

Respectfully submitted,

*Of Counsel:*

MAURICE ROSS
395 South End Avenue
New York, New York 10280

NANCY J. MARSHALL
755 Magazine Street
New Orleans, Louisiana 70130

STEVEN A. HIRSCH
KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER
425 Park Avenue
New York, New York 10022

DAVID KLINGSBERG
KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER
425 Park Avenue
New York, New York 10022

GARY S. GUZY *
1575 Eye Street, N.W.
Washington, D.C. 20005
(202) 483-8860
*Counsel for Petitioner*

* Counsel of Record

August 6, 1987

# STATUTORY APPENDIX

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Louisiana Code of Criminal Procedures Annotated
(West 1984 & Supp. 1986)

## CHAPTER 3. SENTENCING IN CAPITAL CASES

Art.

905. Capital Cases; sentencing hearing required.
905.1. Sentencing hearing jury; commencement.
905.2. Sentencing hearing; procedure and evidence.
905.3. Sentence of death; jury findings.
905.4. Aggravating circumstances.
905.5. Mitigating circumstances.
905.6. Jury; unanimous recommendation.
905.7. Form of recommendations.
905.8. Imposition of sentence.
905.9. Review on appeal.

### Art. 905. Capital cases; sentencing hearing required

Following a verdict of guilty in a capital case, a sentence of death may be imposed only after a sentencing hearing as provided herein.

### Art. 905.1. Sentencing hearing jury; commencement

A. Except as provided in Part B herein, the sentencing hearing shall be conducted before the same jury that determined the issue of guilt. The order of sequestration shall remain in effect until the completion of the sentencing hearing.

B. If an error occurs only during the sentencing hearing which would necessitate the declaration of a mistrial, or the granting of a new trial by the trial court, or if an appellate court finds an error that occurred only in the sentencing hearing which would necessitate a remand and a new trial, then the trial court shall be empowered to empanel a new jury under the same procedure set out in

Title XXVI, Chapter 3 of The Louisiana Code of Criminal Procedure for determining only the issue of penalty, and the rule of sequestration shall apply to the new jury so empanelled.

**Art. 905.2. Sentencing hearing; procedure and evidence**

The sentencing hearing shall focus on the circumstances of the offense and the character and propensities of the offender. The hearing shall be conducted according to the rules of evidence. Evidence relative to aggravating or mitigating circumstances shall be relevant irrespective of whether the defendant places his character at issue. Insofar as applicable, the procedure shall be the same as that provided for trial in the Code of Criminal Procedure. The jury may consider any evidence offered at the trial on the issue of guilt. The defendant may testify in his own behalf. In the event of retrial the defendant's testimony shall not be admissible except for purposes of impeachment.

**Art. 905.3. Sentences of death; jury findings**

A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and, after consideration of any mitigating circumstances, recommends that the sentence of death be imposed. The court shall instruct the jury concerning all of the statutory mitigating circumstances. The court shall also instruct the jury concerning the statutory aggravating circumstances but may decline to instruct the jury on any aggravating circumstance not supported by evidence. The court may provide the jury with a list of the mitigating and aggravating circumstances upon which the jury was instructed.

**Art. 905.4. Aggravating circumstances**

The following shall be considered aggravating circumstances:

(a) the offender was engaged in the perpetration or attempted perpetration of aggravated rape, aggravated kidnapping, aggravated burglary, aggravated arson, aggravated escape, armed robbery, or simple robbery;

(b) the victim was a fireman or peace officer engaged in his lawful duties;

(c) the offender has been previously convicted of an unrelated murder, aggravated rape, aggravated burglary, aggravated arson, aggravated escape, armed robbery, or aggravated kidnapping;

(d) the offender knowingly created a risk of death or great bodily harm to more than one person;

(e) the offender offered or has been offered or has given or received anything of value for the commission of the offense;

(f) the offender at the time of the commission of the offense was imprisoned after sentence for the commission of an unrelated forcible felony;

(g) the offense was committed in an especially heinous, atrocious, or cruel manner; or

(h) the victim was a witness in a prosecution against the defendant, gave material assistance to the state in any investigation or prosecution of the defendant, or was an eye witness to a crime alleged to have been committed by the defendant or possessed other material evidence against the defendant.

(i) the victim was a correctional officer or any employee of the Louisiana Department of Corrections who, in the normal course of his employment was required to come in close contact with persons incarcerated in a state prison facility, and the victim was engaged in his lawful duties at the time of the offense.

(j) the victim was under the age of twelve years.

For the purposes of Subparagraph (b) herein, the term peace officer is defined to include any constable,

marshal, deputy marshal, sheriff, deputy sheriff, local or state policeman, game warden, federal law enforcement officer, jail or prison guard, parole officer, probation officer, judge, attorney general, assistant attorney general, attorney general's investigator, district attorney, assistant district attorney, or district attorney's investigator.

**Art. 905.5. Mitigating circumstances**

The following shall be considered mitigating circumstances:

(a) The offender has no significant prior history of criminal activity;

(b) The offense was committed while the offender was under the influence of extreme mental or emotional disturbance;

(c) The offense was committed while the offender was under the influence or under the domination of another person;

(d) The offense was committed under circumstances which the offender reasonably believed to provide a moral justification or extenuation for his conduct;

(e) At the time of the offense the capacity of the offender to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication;

(f) The youth of the offender at the time of the offense;

(g) The offender was a principal whose participation was relatively minor;

(h) Any other relevant mitigating circumstance.

**Art. 905.6. Jury; unanimous recommendation**

A sentence of death shall be imposed only upon the unanimous recommendation of the jury. If the jury unan-

imously finds the sentence of death inappropriate, it shall recommend a sentence of life imprisonment without benefit of probation, parole or suspension of sentence.

**Art. 905.7. Form of recommendations**

The form of jury recommendation shall be as follows:

"Having found the below listed statutory aggravating circumstance or circumstances and, after consideration of the mitigating circumstances offered, the jury recommends that the defendant be sentenced to death.

Aggravating circumstance or circumstances found:

s/ _____
Foreman"

or

"The jury unanimously recommends that the defendant be sentenced to life imprisonment without benefit of probation, parole or suspension of sentence.

s/ _____
Foreman"

**Art. 905.8. Imposition of sentence**

The court shall sentence the defendant in accordance with the recommendation of the jury. If the jury is unable to unanimously agree on a recommendation, the court shall impose a sentence of life imprisonment without benefit of probation, parole or suspension of sentence.

**Art. 905.9. Review on appeal**

The Supreme Court of Louisiana shall review every sentence of death to determine if it is excessive. The court by rules shall establish such procedures as are necessary to satisfy constitutional criteria for review.